In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 547

LAWRENCE F. O'DONNELL, PETITIONER

v.

PAUL A. SULLIVAN, SPECIAL AGENT, INTERNAL REVENUE SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 14–18) is reported at 364 F. 2d 43. The opinion of the district court (R. 445–452)[1] is not yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 1966 (Pet. 19). The petition for a writ of certiorari was filed on September 13, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "R." references are to the "Record Appendix to Brief for Appellant" filed in the court of appeals.

237-970—66

QUESTIONS PRESENTED

1. Whether petitioner, an attorney whose income tax returns were being investigated, could invoke the attorney-client privilege to prevent a bank from complying with an Internal Revenue Service summons requesting production of the records of a checking account entitled "Client's Account" which he maintained.

2. Whether the district court should have enjoined a bank from complying with an Internal Revenue Service summons because petitioner alleged—contrary to the facts of record—that the investigation was designed to harass him.

3. Whether the district court erred in limiting the extent of petitioner's discovery.

STATUTE INVOLVED

Internal Revenue Code of 1954:

> SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.
>
> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—
>
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
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> (2) To summon the person liable for tax or required to perform the act, or any offi-

cer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(26 U.S.C. 7602.)

STATEMENT

Petitioner, an attorney, filed a suit in the district court, seeking (1) to enjoin employees of the Internal Revenue Service from continuing an investigation of petitioner's tax liabilities and (2) to enjoin the assistant cashier of the First National Bank of Boston from complying with an Internal Revenue Service summons calling for the production of certain bank records (R. 5–9, 445). The summons requested the bank to produce statements of a designated checking account in the name of "Lawrence F. O'Donnell—Client's Account," for the years 1961, 1962, and 1963, and microfilms of checks, deposit slips, etc., relating to that account (R. 19–20).[2] Petitioner alleged that

[2] The summons also called for bank statements pertaining to another account in the name "Lawrence F. O'Donnell" (R. 19).

he had "the rights to such records," that production would violate the attorney-client privilege and "the constitutional rights of your Petitioner," and that the summons had been issued to harass and destroy petitioner and in order to investigate crime (R. 5–9).[3]

Prior to a hearing on the request for an injunction, petitioner caused subpoenas to be served on various personnel of the Internal Revenue Service requiring the production, *inter alia,* of official and personal diaries, chronological work sheets, and notes from Treasury schools (R. 20–33). Prior to the hearing, the district court stated that only relevant records, specifically designated at the hearing, would be ordered produced in response to petitioner's subpoenas (R. 40–41). During the hearing, the court ordered that all entries in agents' diaries relevant to the issues be produced, together with an affidavit from the Assistant United States Attorney that nothing else was relevant (R. 324–335). Petitioner was given an opportunity to examine each witness with respect to any relevant material in the diaries (R. 335–344), the full diaries being in court (R. 337, 344).

After five days of hearings (R. 3–4), at which numerous Internal Revenue Service personnel testified

[3] The petition also noted (R. 8) that a contempt proceeding was pending against petitioner "on matters arising out of your Petitioner's functions as an attorney for the taxpayer referred to herein." The taxpayer mentioned is evidently Bernard G. McGarry. See *McGarry* v. *Riley*, No. 548, this Term, in which a petition for a writ of certiorari was filed by attorney Lawrence F. O'Donnell (petitioner herein) on the same day as the instant petition.

(R. 43–412), the district court rendered an opinion dismissing the petition (R. 445–452). The court found: (1) that "The records in question are clearly the property of the bank" (R. 451); (2) "that there is no connection between the present investigation * * * and the activities of the Organized Crime Drive Group" (R. 448); (3) that petitioner's returns were selected for examination in a purely routine fashion (R. 445–446); (4) that there "is no evidence that at the present time the making of any criminal charges is under consideration" (R. 449); and (5) that "there is nothing to show that this investigation is not, as it purports to be, a genuine inquiry to determine the correctness of petitioner's tax returns" (R. 449). The court of appeals affirmed (Pet. 18).

ARGUMENT

Petitioner contends that the requested injunction should have been granted (1) because the bank's records concerning his accounts were protected by the attorney-client privilege (Pet. 7–9), and (2) because the entire investigation was unlawful, having as its purpose harassment and the discovery of crime (Pet. 11–13). He also contends that his subpoenas were unduly restricted (Pet. 9–11). None of these contentions has merit or warrants further review.[4]

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[4] Petitioner's complaint sought an injunction against officers of the United States, as well as against an officer of the bank. This Court has held that no such action will lie against officers of the Internal Revenue Service, since petitioner has other available remedies. *Reisman* v. *Caplin*, 375 U.S. 440. Thus, if petitioner feared that the bank would voluntarily turn over its records to the Service, he was entitled, upon a showing that his legally protected rights might thereby be violated, to

1. Petitioner cannot invoke the attorney-client privilege here. The Internal Revenue Service merely seeks to ascertain, by means of bank records, whether the money which petitioner deposited in the bank account constituted his taxable income or was being handled by him as a fiduciary. Even assuming that the deposited funds did belong to his clients, the Service has sought no information from petitioner with regard to any confidential communications between him and his unnamed clients. It has merely sought to obtain the bank's records. The only relationship between petitioner and the bank is that of debtor and creditor. The bank did not participate in the rendering of legal advice or service; it merely acted as a depository. Thus even if the funds belonged to petitioner's clients the attorney-client privilege would not cover petitioner's transactions with the bank (in the form of deposits, withdrawals, etc).

Petitioner has cited no cases holding that the attorney-client privilege protects the records of a bank, and we have discovered none. In *Baird* v. *Koerner*, 279 F. 2d 623 (C.A. 9) (cited Pet. 7), the court declined to require an attorney to reveal the identity of his client. Here, petitioner is attempting to prevent a

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an injunction against the bank (but not against officers of the the Internal Revenue Service). The United States could then bring an enforcement proceeding against the bank in which the petitioner could intervene. 375 U.S. at 449–450. This is the relief he sought against the bank in this case, and the trial court, after a full hearing on the merits, ruled against him. In the instant case the district court denied relief against the bank officer (as well as against the federal officers) on the ground that petitioner's claims have no merit. Since this decision was correct, we shall not further discuss whether the suit was properly maintainable against the federal officials.

third party (the bank) from disclosing information which he has conveyed to it. The Seventh Circuit has recently held that while an attorney can not be compelled to reveal the identity of his client (*Tillotson* v. *Boughner,* 350 F. 2d 663), the attorney could not clothe a bank's records (relating to same transaction) with the attorney-client privilege. *Schulze* v. *Rayunec,* 350 F. 2d 666, certiorari denied *sub nom. Boughner* v. *Schulze,* 382 U.S. 919.

In *Mauch* v. *Commissioner,* 113 F. 2d 555 (C.A. 3), the government showed that monies deposited in an attorney's bank accounts were not included in his income tax returns. The attorney claimed that the monies belonged to clients, whose names he refused to reveal. The court held that public policy would not permit the invocation of the privilege (merely to hide the identity of the putative clients) in these circumstances. In the instant case petitioner is not being asked to disclose the identity of his clients or any confidential communications, and there is nothing to indicate that the bank records would contain such information. Accordingly, the district court was correct in declining to enjoin the bank from producing the business records it maintained with regard to petitioner's accounts.

2. Petitioner contends that the district court should have enjoined production of the bank's records (as well as any further investigation of petitioner's tax returns), because he "was the subject of an arbitrary bad-faith Organized Crime investigation by the Internal Revenue Service in violation of Title 26 U.S.C." (Pet. 11–13). The record, however, does not bear out petitioner's factual assertions. The district

court took extensive testimony on this point (R. 43–412) and concluded that the present investigation was instituted in a perfectly routine fashion (R. 445–446, 448–449).[6] And the court of appeals observed that "the lengthy record amply supports [the district court's] * * * findings" (Pet. 16).

3. Finally, petitioner contends (Pet. 9–11) that the district court unduly restricted the subpoenas which petitioner had caused to be issued to various Internal Revenue Service personnel. This contention is also without merit. These subpoenas (R. 20–33) requested the production of the agents' diaries, work sheets, notes, etc., without regard to whether they were relevant to petitioner. The district court correctly ordered the agents to produce only those portions of the requested documents which related to petitioner. The United States Attorney filed an affidavit that all relevant portions had been produced, and petitioner was permitted to use these documents to cross-examine the agents. As the court of appeals stated in its opinion (Pet. 18):

> The nine subpoenae asked, among other records, for all diaries (official and personal) and work sheets covering four years, and all notes during attendance at various schools. The requests were made without limitation to matters

[6] An agent in the Audit Division testified that he selected petitioner's 1962 return for audit because of a routine Treasury report concerning petitioner's deposits of large amounts in bills of $100 or more in denomination (R. 300–302). Another agent in the Audit Division testified that he selected petitioner's 1963 return because of "extraordinary medical expenses" and questions relating to petitioner's business income and expenses (R. 306–308).

related to appellant. The district judge, faced with what might well be considered frivolous requests, exercised admirable patience in giving every opportunity to appellant to designate documents. The appellant failing to do this, the judge ordered all relevant documents to be produced. Appellant was allowed to place them in evidence and recall witnesses for further questioning based on the documents. Clearly there was no error and only such partiality as indulged the appellant.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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